Approved For Release 2005/02/10 : CIA-RDP75-00770R000100010004-9

University of
Cincinnati Law Review

PUBLISHED QUARTERLY BY THE BOARD OF EDITORS

VOLUME 37 FALL 1968 NO. 4

CONTENTS

The University of Cincinnati Law Review is published quarterly at Cincinnati, Ohio. Second-Class postage paid at Cincinnati, Ohio. Printed by Johnson-Hardin, Inc., Cincinnati, Ohio.

Subscriptions: $5.00 per year, payable in advance. Single Issue: $1.50. Subscriptions are automatically renewed unless a request for discontinuance is received thirty days prior to mailing.
Reprints of Articles appearing in this issue are available at $1.00 and up.

Address correspondence to: University of Cincinnati Law Review, Taft Hall, University of Cincinnati, Cincinnati, Ohio 45221.

The conclusion drawn from legislation, case law, and surrounding circumstances is that the *Grace* court should have ruled, as a matter of law, that the duty of reasonable care did not require the repledgee to notify the pledgor of the impending redemption date after which the conversion possibilities would be eliminated.

G. DAVID SCHIERING

TORTS—LIBEL AND SLANDER—ABSOLUTE PRIVILEGE OF SUPERIOR IS AVAILABLE TO GOVERNMENT AGENT WHO CARRIES OUT ORDERS.—*Heine v. Raus*, 399 F.2d 785 (4th Cir. 1968).

The plaintiff, Eric Heine, had been active in Estonian emigré groups and had earned part of his livelihood by showing movies and lecturing to these groups about Communist brutalities.[1] At a meeting of the Legion of Estonian Liberation, the defendant, Raus, a secret agent for the Central Intelligence Agency,[2] stated that the plaintiff was a Communist and a KGB agent.[3] Suit was brought in the United States District Court for the District of Maryland alleging that the statements were false and defamatory per se,[4] and were made maliciously. The court, relying on affidavits alleging that the defendant had been instructed to make the statements and that he was acting within the scope of his employment, entered summary judgment in his favor on the ground of absolute privilege.[5] On appeal to the Court of Appeals for the Fourth Circuit, *held:* Affirmed.[6] A govern-

---

care imposed upon a repledgee is based in the law of bailments, it would follow that the custodial bank, as a bailee, would have the same duty of notification. The only way such a duty could be avoided by a custodian would be for the custodian to enter a disclaimer agreement with each pledgor as permitted by UCC § 1-102(3). This is an untenable approach in terms of both the number of pledgors involved and the frequent turnover of the custodian's security holdings. The repledgee could avoid his duty by a similar agreement with the pledgor.

[1] The movies concerned activity which had taken place in Estonia, and the lectures described mistreatment experienced by Heine in Russian prison camps. Heine v. Raus, 261 F. Supp. 570, 571 (D. Md. 1966).

[2] Raus was also the National Commander of the Legion of Estonian Liberation and it appears from the CIA's affidavits that his position was helpful to the CIA because the Estonian groups were considered a source of foreign intelligence. *Id.* at 573.

[3] The KGB is the Soviet Secret Police.

[4] Defamation per se is that which is actionable without proof of actual damage. It may be so considered, if, for example, the statement affects a plaintiff in his trade or profession. *See* W. PROSSER, TORTS 772 (3d ed. 1964).

[5] Heine v. Raus, 261 F. Supp. 570 (D. Md. 1966).

[6] The court remanded the case subject only to a limited inquiry of whether the Director, a Deputy Director or a subordinate official, having authority to do so, authorized, approved or ratified the instructions, but summary judgment was generally approved.

ment agent has an absolute privilege to make defamatory remarks when executing the instructions of superiors, and summary judgment is available when supported only by conclusory affidavits.[7]

Absolute privilege as a defense in defamation suits was initially established for use by judges in *Bradley v. Fisher*.[8] Twenty-five years later that privilege was made available to the heads of executive departments of the Federal Government in *Spalding v. Vilas*.[9] The privilege was limited to officials of cabinet rank and was applied only to statements mailed directly to a limited group. An explanation of the privilege and its availability to government officials was also the subject of a Supreme Court opinion in *Barr v. Matteo* [10] where, by a five-four decision, substantial extensions of the privilege doctrine by a lower court were approved.[11] The defamatory statements in *Barr* were made in a press release by the acting director of a government agency and were triggered by criticism of the acting director and the agency itself. In the press release it was stated that the plaintiffs were responsible for certain disapproved conduct and that their suspension would be forthcoming. In according the director an absolute privilege the Court made the defense available to government officials below cabinet rank,[12] and applied it to statements made in a press release, thus expanding both the class of individuals and the scope of publication to be protected.

In *Heine v. Raus*,[13] the court of appeals has extended the defense of absolute privilege further to include a government employee who was not an agency official. The court concluded that if the statements had been made by the CIA Director himself, rather than by a CIA agent, the absolute privilege would have been more justifiably applied in the instant case than it was in *Barr*. The defense would serve a higher public interest if applied to the CIA Director because of the CIA's involvement wth national security. Furthermore, criticisms of *Barr*, that the acting director was not within the scope of his employment in issuing the press release, would be minimized. The court decided that a necessary corollary of the superior's privilege is its

---

[7] Heine might have been more successful had the action been brought in the state court because Maryland has expressed its extreme opposition to the privilege. *See* Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1152–53 (1962).

[8] 80 U.S. (13 Wall.) 335 (1871).

[9] 161 U.S. 483 (1896).

[10] 360 U.S. 564 (1959).

[11] For the historic development of various extensions of *Spalding* by the Court of Appeals for the District of Columbia Circuit, see Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1135–47 (1962).

[12] The practical result of *Barr* was to make the privilege available to a larger number of government officers especially in light of government growth from 1896 to 1959. *See* 360 U.S. 564, 573 n.10 (1959).

[13] 399 F.2d 785 (4th Cir. 1968).

availability to an agent carrying out orders of that officer.[14] This conclusion was bolstered by recognition that if the plaintiff were a communist spy, the CIA's only alternative would have been to place its own agents in jeopardy, and that action by the CIA was necessary under a congressional mandate to protect foreign intelligence sources.[15] The only permissible inference which would invalidate the court's conclusion was that the instructions could have been given by an unauthorized underling, and summary judgment was approved subject only to investigation of the actual source of the instructions.

The nature of an absolute privilege is such that malice, if proven by the plaintiff, is of no significance.[16] There are only two methods of attacking the privilege. The first, a showing that the defendant is not within the class of protected persons, was held not to be applicable in *Heine* because of the agency relationship. The second, a showing that the defendant was not acting within the scope of his employment when the statement was made, was not even discussed by the court. By accepting the affidavits of the CIA Director[17] as being adequate to support summary judgment the court assumed "scope of employment." This assumption violates Rule 56(e) of the Federal Rules of Civil Procedure which requires that affidavits contain facts which would be admissible as evidence. At the beginning of the suit the plaintiff had both the burden of going forward with evidence and the burden of persuasion. He proved that the statements were defamatory and were spoken by the defendant, and the

---

[14] This "necessary corollary" was suggested in an article critical of the lower court's opinion. Comment, *Spying and Slandering: An Absolute Privilege for the CIA Agent?*, 67 COLUM. L. REV. 752 (1967).

The court of appeals also relied on § 345 of the *Restatement (Second) of Agency* as authority for attributing the Director's privilege to its agent. Comment *a* of the same section, however, warns that a privilege may not be capable of exercise by persons other than those to whom it has been granted but that, in any case, the underlying purpose for which it exists should be carefully considered. RESTATEMENT (SECOND) OF AGENCY § 345 (1958). While the court does discuss the policy justifications for the existence of the defense, it could be argued that the historic reluctance of courts to extend the absolute privilege and the attitude of the Supreme Court in *Barr* indicate that the defense is a personal one. It could be further argued that these factors also indicate that those who are to be accorded the privilege are a minority of government officials selected for inclusion primarily because of their discretionary functions, and thus, it is not meant to be attributed to agents. Illustration 2 of § 345 is used by the court to show that the section is applicable in defamation actions, but the publication in that illustration was subsequent to an inquiry, just as Barr's press release was subsequent to congressional inquiries. Raus, however, was acting under instructions and not responding to justified inquiries.

[15] "[T]he Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosures . . . ." Act of June 20, 1949, ch. 227, § 7, 63 Stat. 211; National Security Act of 1947, § 102, 61 Stat. 497.

[16] Malice defeats a qualified privilege. W. PROSSER, TORTS 821 (3d ed. 1964).

[17] Heine v. Raus, 261 F. Supp. 570, 572–73 (D. Md. 1966).

burden of going forward should have been shifted. The defendant should have been required to show not only that he was entitled to the privilege, but also that the statements were made while he was within the scope of his employment.[18] The court erroneously assumed that the allegations in the affidavits were sufficient[19] and thus kept the burden of going forward on the plaintiff knowing that he could not possibly show that the defendant was not entitled to the privilege as long as the government maintained its secrecy immunity.[20]

Even if the court was correct in assuming that the defendant was within the scope of his employment, it was not compelled to allow the privilege in this case because *Heine* did not present a fact situation to which the defense was intended to apply. Justification for the privilege in *Barr* was based on the impossibility of finding that a claim against an official was well founded until after the trial.[21] In *Heine*, however, the CIA had admittedly made a deliberate selection of the words to be used by its agent[22] in a direct attack on the reputation of the intended individual. *Barr* involved a question of personal discretion exercised in response to congressional inquiry, and the privilege is arguably justifiable as protection for the press release as a means of informing the public about agency activity when interest was high. *Heine*, on the other hand, involves a question of governmental policy choice not justified as a necessary response to inquiry. The CIA does have the duty to protect foreign intelligence sources, but neither Congress nor the historic development of the privilege suggest that defamation be used as a tool to implement national security policies.

Some authorities who have studied the desirability of absolute executive privilege agree that the best solution would be total abolition in favor of government liability and that this will probably be the ultimate solution.[23] *Heine v. Raus* presents an ideal case for making a step in this more desirable direction. If the court had found that the privilege was not available to federal employees, it is

---

[18] *See* W. PROSSER, TORTS 823 (3d ed. 1964).

[19] Since there is to be no further inquiry in this area, the court is either assuming scope, or is allowing application of the privilege as long as Raus accomplished his assignment, despite scope of duty.

[20] Consider that, though Raus' scope of duty might once have been a valuable secret, his cover has been exposed and there is no longer any reason for the government to withhold the information.

[21] 360 U.S. at 571 (1960).

[22] 261 F. Supp. at 572–73 (1966).

[23] Barr v. Matteo, 360 U.S. 564, 591 (1959) (Brennan, J., dissenting). *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 137 § 26.04 (Supp. 1965); Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1171 (1962); Handler & Klein, *The Defense of Privilege In Defamation Suits Against Government Executive Officials*, 74 HARV. L. REV. 44, 76 (1960); *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 838 (1957).

possible that the defendant might not have had to bear the expense of judgment.[24] He might have been reimbursed by the government because he had been following orders. If this were the case, the balance between the interests of protection for the individual citizen from malicious action by government officials on the one hand, and protection of the public interest by shielding officers from harassment by ill-founded claims on the other, would not have to be artificially weighted in favor of the public interest at the expense of an individual's reputation. The cost of damage caused by official blunders and misconduct would be properly allocated by government to the society in whose interest official duties are exercised.

DAVID H. BEAVER

INCOME TAX—PARTNERSHIPS—PARTNER ENTITLED TO EXCLUDE VALUE OF MEALS AND LODGING FURNISHED FOR CONVENIENCE OF PARTNERSHIP FROM HIS GROSS INCOME.—*Armstrong v. Phinney*, 394 F.2d 661 (5th Cir. 1968).

A partnership owned a ranch in which the taxpayer had a 5 percent interest. In addition to his share of the partnership's profits, the taxpayer, who was manager of the ranch, received a home at the ranch for himself and his family, most of his groceries, utilities, and maid service. The taxpayer excluded the value of these emoluments from his gross income for the years 1960, 1961, and 1962.[1] The Commissioner assessed a deficiency which the taxpayer paid. The taxpayer sued for a refund which was denied by the District Court for the Western District of Texas[2] on the ground that a partner could not be an "employee" of his partnership, and therefore did not qualify for the exclusion provided by Section 119 of the Internal Revenue Code of 1954.[3] On appeal to the United States Court of

---

[24] This argument assumes that the plaintiff can prove that the defendant abused the qualified privilege available because the defendant was the leader of the Estonian groups and as such had a "common interest" with them. *See* W. PROSSER, TORTS 809 (3d ed. 1964).

[1] The taxpayer excluded the value of the home, groceries, utilities, maid service, insurance for the house, and entertainment of business guests in the ranch. It was agreed that $6,000 represented the yearly value of the items in question. Armstrong v. Phinney, 394 F.2d 661, 662 & n.3 (5th Cir. 1968).

[2] The opinion of the district court is unreported.

[3] INT. REV. CODE OF 1954, § 119 provides:

> There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—
>
> (1) in the case of meals, the meals are furnished on the business premises of the employer, or